Supreme Court, U.S.
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No. 95-543

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

E.L. CLARK,
Petitioner,
v.
DERRELL O. FANCHER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION

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NOVEMBER 1995

QUESTIONS PRESENTED

In addition to Question I tendered by Petitioner, the following questions are presented:

1. Was the finding of the Review Board in this case to the effect that the Alabama State Health Planning and Development Agency did not have an established *per se* rule treating the landlord, rather than the lessee-operator, of a nursing home in operation on the day prior to the effective date of the Alabama Certificate of Need Law, Ala. Code § 22-21-260 to -278, as entitled to "grandfather" status, so devoid of support in the record that it must be, as a matter of federal constitutional law, set aside, so that the question of "treating like cases unlike" tendered by the Petition may be reached?

2. Was it a "taking" of the property of the Petitioner without due process of law for the Agency to conclude that the lessee-operators of the nursing homes located in Petitioner's buildings, rather than Petitioner as landlord, had a superior grandfathered right to operate nursing homes, in the light of the findings of the Agency that the Petitioner was responsible for the deterioration of nursing homes that he operated and buildings that he leased to nursing home operators into a condition where they were grossly unsafe and unsanitary so as to endanger the health and safety of the patients, and where all other lawful uses of the Petitioner's land and buildings, apart from their use as health care facilities, remain open to him?

PARTIES AND CORPORATE AFFILIATES

Rule 14.1(b)

The Petitioner has failed to present a list of all parties who are Respondents in this case (Appellees in the Alabama Court of Civil Appeals) as required by Rule 14.1 (b). A full list is as follows: Derrell O. Fancher; State Health Planning Agency (formerly named State Health Planning and Development Agency), an agency of the State of Alabama; Albertville Nursing Home, Inc.; Barfield Health Care, Inc.; Ozettia Gilliland; Ruby Kimberly; Jessie Sims; Dora Stephens; James Thompson; Alma Walls; Nell Broach; Opal Dobbins; Allie Garrett; Anna Hunt; Margaret Johnston; Winifred McVeigh; Sara Smith; and Alta Mae Williams. (Ms. Gilliland, *et al.*, are residents of the nursing homes operated by the corporate Respondents.)

Rule 29.6 Statement

This brief is filed on behalf of all the above-named Respondents. The only Respondents on whose behalf this brief is filed which are corporations are Albertville Nursing Home, Inc., and Barfield Health Care, Inc. Neither of these two corporations has any parent corporation and neither of them has any subsidiary corporation which has stock in the hands of the public.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents oppose the grant of certiorari in this case and request that the Petition of E.L. Clark ("Clark") be denied.[1]

STATEMENT

The Alabama Statutory Scheme.—Prior to July 30, 1979, anyone could "acquire, construct or operate" an "institutional health service," such as a nursing home, in the State of Alabama. Thus, at that time, subject only to licensing, based on a health, safety and sanitation inspec-

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[1] Since there was no judgment of the Alabama Supreme Court other than simply a quashing of the writ of certiorari it had previously granted (Pet. App. 1a), it appears that certiorari should have been sought to the Alabama Court of Civil Appeals, rather than to the Alabama Supreme Court. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 6.21 at 326 (7th ed. 1993).

tion by the Alabama Department of Public Health, anyone could construct, acquire or operate a nursing home. On that date, however, the Alabama Certificate of Need Law, Ala. Code § 22-21-260 to -278 (1975 & Supp. 1994), became effective. Thereafter no one could "acquire, construct or operate" a new "institutional health service," including a nursing home or other specified health care service, change the location of an existing one, or increase the bed capacity of an existing facility, without a Certificate of Need ("CON") issued by the State Health Planning and Development Agency ("SHPDA"). In that enactment, the Legislature declared "that it is the public policy of the state of Alabama that a certificate of need program be administered in the state to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state." (Ala. Code § 22-21-261; *see also* §§ 22-21-263 and -265) Existing nursing home services were implicitly "grandfathered" and could continue to operate without going through the procedures for demonstrating need imposed by the new legislation. But among other things those services could not, without a CON, move their operations to another facility or add additional bed capacity. The statutory "grandfathering" was not express; it was implicit because of the limitation of the prohibitory provisions of the law to the acquisition, construction or operation of a *new* institutional health service and because of the lack of any provision requiring existing services to justify their continuation by demonstrating need.[2]

Clark as Landlord.—At the time the legislation became effective, Clark was the owner and landlord of two build-

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[2] See, however, pp. 10-11, n.11 below. The operative language in Section 22-21-265(a) was and is: On or after July 30, 1979, no person to which this article applies shall acquire, construct or operate a new institutional health service, as defined in this article, or furnish or purport to furnish a new institutional health service, . . . unless such person shall first obtain from the SHPDA a certificate of need therefor . . . ."

ings leased to others who operated nursing homes in Marshall County, Alabama, one located at Albertville and the other in or near Guntersville. Thus, at the time that the legislation became effective, Clark was not operating a nursing home or other institutional health service; only the lessee-operators were so engaged. Clark then had no license to operate a nursing home.

The building at Albertville had been constructed and expanded in the 1960s and Clark himself had operated a nursing home in it at various times through December 1976. By February 1975, under Clark's operation, conditions at the Albertville building had become so unsanitary and unsafe and the quality of care given there had became so poor that the Department of Public Health revoked Clark's license. (B/C Ex. 89, 141)[3] The license was later reinstated and Clark again for a time operated a nursing home in the Albertville building. But further inspections were made in the Fall of 1976 by the Health Department, which found infestation by vermin, other health hazards and inadequate patient care, and the Department was then again on the verge of revoking Clark's license. (Tr. 141-43; B/C Ex. 92; Pet. App. 42a-43a) In an effort to keep the facility open and avoid requiring the patients to find new care facilities, the public health authorities and Clark agreed that if Clark withdrew from the nursing home business and leased the building to Ms. Audrey Cole ("Cole"), presently the owner of Respondent Albertville Nursing Home, Inc.

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[3] Record references are as follows: "Tr." refers to the Transcript of the evidentiary hearing before the Administrative Law Judge. "B/C Ex." refers to the exhibits submitted by Barfield Health and Cole (the principal of Respondent Albertville Nursing) at that hearing and "Clark Ex." to Clark's exhibits. References to the decisions of the Alabama courts and agency officers appended to the Petition for Certiorari are to "Pet. App." and references to the body of that Petition are to "Pet." The appendices to this brief are referred to as "App."

("Albertville Nursing"), the license would not be revoked and Cole would be given a chance to operate the nursing home as lessee and bring it up to standards. Clark granted Cole a written release of any rights which he had or might have to operate a nursing home in the building at Albertville. (Tr. 1033-36; Tr. 143; B/C Ex. 93, 97, 98; Pet. App. 37a) A ten-year lease of the building was entered into in December 1976 from Clark to Albertville Nursing, a corporation organized by Cole. Albertville Nursing commenced nursing home operations in the building on January 1, 1977.

The Guntersville building was constructed by Clark toward the end of the 1970s. Clark at first proposed to operate a nursing home in the building himself, and made application under a procedure then in effect which required the issuance of an "Assurance of Need" ("AON") certificate by the Alabama public health authorities as a condition upon obtaining Medicare and Medicaid reimbursement for construction costs. On April 17, 1975, Clark's application for the AON was denied by the Alabama Committee of Public Health; the denial was appealed to a Fair Hearing Officer who upheld it. (Tr. 1513-15; Pet. App. 11a-12a, 60a-61a).[4] After this, Clark did not seek a license from the Department of Public Health to operate a nursing home in the Guntersville building, but leased the building to a predecessor in interest to Respondent Barfield Health Care, Inc. ("Barfield Health"), from the start, under a five-year lease initially dated July 12, 1978, before construction was complete.[5] Thus both nursing homes were operated by lessees under long-term leases when the CON legislation

[4] Denial of an AON did not prevent, at the time in question, the construction of the building; it simply affected the reimbursability of the construction costs under the public programs.

[5] The July 1978 lease was replaced by a substitute lease dated January 15, 1979, which was later the subject of a sublease or assignment to Barfield Health.

came into effect and Clark was at that time out of the nursing home business in Marshall County.

The leases on the two buildings required the lessees to perform ordinary maintenance and to effect minor repairs (up to $1,000 in the case of Albertville and up to $4,000 in the case of Guntersville) out of their own pockets but required the landlord to be responsible for structural repairs and reconstructions over those amounts. In the early 1980s, existing structural deficiencies were becoming apparent and various severe problems were developing in the two buildings. In Albertville, these included walls moving, cracks in walls developing to the extent that sections of the building had to be closed off, leaky roofs, defective plumbing, inadequacy of the power system, inadequacy of the lighting, problems with vermin and snakes because of the cracks, absence of insulation, inadequate heating and air conditioning, and sewage backups. (Tr. 60-62; 47-50; 53-58; 357; 1043) Clark steadfastly refused to pay for any repairs in excess of $1,000, which was the limit of the lessee's responsibility. (Tr. 1054-57; B/C Ex. 112; Pet. App. 46a-58a)

While the Guntersville building was quite new in the early 1980s, its construction was highly defective and the physical condition of the building quickly caused unsanitary and unsafe conditions for the patients. The conditions included sidewalks sloping toward the building causing water to flow into it; inadequate utility rooms; nonlevel floors and walls that were not straight; inadequate electrical systems and inadequate plumbing; a roof constantly leaking with vegetation growing on it; a defective sewage system causing a backup of sewage into the building, including the kitchen; a vintage 1942 World War II surplus electric generator; no wall or ceiling insulation; exposed piping; and nonfitting doors. (Tr. 795-99; 819; 1805; Pet. App. 58a-78a) One expert witness, who held a university degree in building construction, said that the Guntersville building was "the worst

constructed building that I have seen since graduating." (Pet. App. 72a)

The CON Applications.—In July 1985, Albertville Nursing and Barfield Health separately made emergency applications for CONs to construct and operate replacement nursing home facilities, having the same respective number of beds, elsewhere in Marshall County. The applications cited the deteriorated and dangerous physical conditions in the two Clark buildings. The applications were premised on the basis that there was a need for the new facilities, not in addition to the buildings owned by Clark, but because Clark's buildings were grossly inadequate in terms of the necessities for the safe and sanitary operation of a nursing home.[6] Under the CON legislation, while Albertville Nursing and Barfield Health could continue their operations where they were conducted on July 30, 1979, without CONs, CONs would be required if they relocated. The SHPDA granted the two CONs to Albertville Nursing and to Barfield Health on October 16, 1985. The SHPDA did not give Clark notice of, or an opportunity for hearing before, the issuance of the CONs to Albertville Nursing and to Barfield Health. In 1986, Albertville Nursing and Barfield Health constructed and moved into the new facilities. Clark applied for nursing home licenses for his two buildings, then vacant, but the licenses were denied on the grounds that he did not have CONs for the operation of nursing homes. (Pet. App. 5a-6a)[7]

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[6] At that time, there was in effect a moratorium, imposed by Executive Order of the Governor, restricting the filing and processing of and action on CONs. Exec. Order No. 28, Aug. 1, 1984; *see* Amendments thereto dated Jan. 28, 1985, and April 30, 1985, extending the same. The moratorium permitted the filing of emergency applications and "replacement" applications. Exec. Order No. 28, Aug. 1, 1984, at 2.

[7] There then followed an episode in which Clark commenced operating a nursing home in his Albertville building without a CON or a nursing home license; health department inspectors at-

The District Court Action.—Clark then commenced an action in the United States District Court for the Middle District of Alabama against members of the SHPDA, various other state officials, and Albertville Nursing and Barfield Health and their principals, on the basis of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. *Clark* v. *Crowe,* M.D. Ala., C.A. 86-T-139-N. He claimed that the issuance of the CONs to Albertville Nursing and Barfield Health violated procedural Due Process Clause guarantees because he was not given notice and an opportunity for hearing prior to the issuance of the CONs. He also claimed that the issuance of the CONs violated substantive Due Process Clause guarantees. In effect, Clark argued that if the lessee-operators moved out of his buildings, the SHPDA was obligated under his grandfathered rights and as required by the Due Process Clause of the Fourteenth Amendment to permit him to start nursing home operations in those buildings himself or to lease the buildings to a new operator for that purpose. He argued that since it was common ground that the number of beds provided at the two existing buildings could not be doubled consistent with the "needs" standard of the statute, therefore CONs could not be issued to Albertville Nursing or to Barfield Health. Clark argued that the District Court should so rule itself and that the SHPDA had no power to rule otherwise. (App. 7a-8a, 13a)

The District Court, in an Opinion (with accompanying Order) entered April 9, 1991,[8] held that the failure to

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tempted to enter the building but were refused access by Clark; the inspectors were forced to obtain a warrant for Clark's arrest and required the assistance of the County Sheriff to enter the building; a criminal prosecution of Clark ensued, in which he pleaded guilty, and a civil injunction action in which Clark consented to an order removing the patients from his building. (B/C Exs. 204, 205, 206; Tr. 411-22)

[8] We attach the Opinion as Appendix A hereto. Certain additional orders of, and proceedings in, the District Court are also presented as Appendices.

give Clark notice and an opportunity to be heard before the issuance of the CONs was in violation of Clark's procedural due process rights. However, the Court rejected Clark's contention that the decision was substantially arbitrary and capricious to the extent that "SHPDA could find in his favor only" in order for its actions to be consistent with the Due Process Clause. (App. 13a) The Court held that "Clark and his lessees have a shared interest in the grandfather status of the Albertville and Guntersville facilities" (*id.*) and ruled as follows:

> The court . . . finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a "grandfather status" when the CON statute went into effect in 1979. *The court cannot say that his status was exclusive, however.* Cole and Barfield, as operators of the two nursing homes, also had an expectation in the continued operation of the two facilities when the CON law went into effect.
>
> Clark asks that the court determine who holds the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or a lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result, in general and in this case specifically, would better further the public interests of the CON statute. SHPDA should resolve this issue, not the court. (App. 12a-13a; footnotes omitted; emphasis supplied)

The Court's injunctive order required that the SHPDA grant Clark a hearing "with regard to the transfer of the beds and services in his two nursing homes" and to "reconsider *de novo* the transfer of the beds and services in light of any appropriate comments and evidence" Clark might present. (Order of the District Court, Apr. 9,

1991) In response to a motion by Clark for an order establishing that only he could submit evidence at the hearing, the District Court, denied the motion and held that the evidence could come from any source, including Cole and Barfield Health. (App. 15a) Another order entered a few days later made it plain that Clark's case should be heard before the SHPDA's Review Board unless he requested a "contested case" under Alabama procedure, in which case it should be heard by an Administrative Law Judge. (Order of District Court, May 7, 1991)[9]

The SHPDA did not appeal the District Court's decision holding that Clark's procedural rights had been violated. Clark did not appeal the District Court's decision refusing to hold the orders issuing the CONs to be arbitrary and capricious and refusing to grant Clark declaratory relief that he exclusively held "grandfathered" rights to operate nursing homes.

The Agency Hearing.—Proceeding to the agency, Clark requested "contested case" treatment and an Administrative Law Judge ("ALJ") was appointed. Evidentiary hearings took place before the ALJ on seven days in June 1991; over 1900 pages of testimony were transcribed; and over 500 exhibits were tendered by the parties. Clark participated fully with counsel. Under a stipulation as to procedure agreed to by all parties, briefs in the form of proposed orders were to be submitted to the Board contemporaneously with the submission of the ALJ's recommended order. (Pet. App. 22a-23a) The ALJ issued a recommended order to the Review Board of the SHPDA. While the filing of exceptions to the ALJ's recommended decision was not among the agreed procedures, Clark was permitted to file such exceptions (*id.*); a hearing for the presentation of arguments was held

[9] Alabama Code §§ 41-22-12 to 41-22-18 provide detailed procedures for the conduct of contested hearings, the rules of evidence therein, the procedure where the Agency itself has not presided at the hearing, and other matters.

before the Board in August 1991; and a lengthy final order was issued by the Board granting the CON applications of Albertville Nursing and Barfield Health. (Pet. App. 19a-83a)

The Order contained a lengthy analysis of the testimony which had been submitted as to the history of the policies and practices of the SHPDA in construing the concept of "grandfathering" as among multiple holders of interest in a facility, and particularly as between "owners" and "lessee operators." (Pet. App. 30a-36a) The Order's analysis was based on a review of "the records of prior agency actions" and "on the testimony of past and present SHPDA officers." (*Id.* at 36a) The Order noted some contradictions in the testimony of prior and present officials of the SHPDA on the mater. (Pet. App. 30a) The Order's analysis reviewed the testimony of the witnesses Alan Koch, a former executive director of SHPDA; Peggy Schmitz, counsel to the SHPDA, both to the effect that the administrative practice was that the lessee-operator had the superior grandfathered interest; Eugene Watson, who had also served as counsel to the SHPDA, to the same effect; and that of Clay H. Dean, who had been a director of the SHPDA prior to Mr. Koch, at a time when it was part of the State Health Department prior to the enactment of the CON legislation. Dean had never administered the CON law, and his views were different from those of the other witnesses.[10]

Dean's testimony initially was that Clark was "grandfathered" under a provision then found in the Alabama Code as § 22-21-265(b), set forth in the margin.[11] The

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[10] Ignoring the Board's analysis, the Petition provides its own alternative analysis of the testimony of these witnesses at the hearing, drawing, and inviting this Court to draw, different inferences and conclusions from the testimony than did the Review Board. (Pet. 8-15)

[11] The section, which does not appear to be a grandfathering provision in the usual sense, reads as follows in pertinent part:

difficulty with this was that the statutory provision was based on possession of a valid AON, and Clark never had an AON for either of his two buildings. Dean then admitted that the section in question did not apply to Clark but claimed that Clark was grandfathered because, in Dean's understanding, Albertville Nursing and Barfield Health were his "agents." Dean did not recognize any difference between an "agent" and a "lessee." See Clark Ex. 282, Dean Deposition, at 27, 139-44.

In the light of its analysis, and resolving the factual disputes in the testimony, the Order held that the determination of which party held the "superior" "grandfathered" interests as between landlord and lessee-operator had not been the subject of a consistent, historic practice one way or the other, and that accordingly the determination contemplated by the District Court's order "must be made on a case-by-case basis, considering the '*totality*' of circumstances." (Pet. App. 36a; emphasis in original)

Reviewing the evidence at length (*id.*, 40a-47a), the Order found that it was the intention of Clark at the pertinent time to discontinue holding himself out as being in the nursing home business, and it was his intention that the lessee assume the responsibility for providing nursing home services. On this basis the Order held that Albertville Nursing had the superior grandfathered interest which gave it the right to seek a CON authorizing the relocation of the beds in question. (*Id.*, at 37a, 78a) Reviewing the history of the Guntersville operation, largely as set forth above (pp. 4-6), and making findings as to it (Pet. App. 58a-77a), the Order found that Barfield Health, as corporate successor to Clark's original

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(b) Notwithstanding the provisions of subsection (a) of this section, any person who, on July 30, 1979, holds a valid assurance of need issued pursuant to Section 1122 of the Social Security Act, shall be entitled to be issued a certificate of need for the facility or service described on the application for the assurance of need. . . .

lessee, had the "superior" "grandfathered" interest in the beds located there. (*Id.*, at 80a-81a)

In reaching these findings, the Board's Order extensively reviewed the testimony and made findings as to the unsafe and unsanitary physical condition of the buildings owned by Clark in 1985. Based on the testimony, the Board found that the two Clark buildings, at the time of the 1985 applications by Albertville Nursing and Barfield Health, were each in a condition which endangered the health and safety of the patients. (*Id.*, at 77a-78a) The Board also found that the conditions were primarily Clark's responsibility and that the record reflected Clark's unwillingness to cooperate with the lessees to conduct necessary repairs and improvements in a reasonable fashion. (*Id.*, at 77a) The Board also found that given the extent of the conditions and without regard to the responsibility for the repairs, the repair or renovation of the two buildings was not a viable alternative. (*Id.*, at 58a, 77a) The Board also made the necessary statutory findings as to the qualifications of the applicants and the satisfaction of the "need" test under the statute and the satisfaction of the exceptions to the Governor's moratorium on CONs (p. 6, n.6, above) which was in effect at the time the July 1985 applications were filed. (Pet. App. 78a-83a)

Back to the District Court.—Clark filed a request for a "Fair Hearing Review," a procedure involving a further administrative review of agency action by a "Fair Hearing Officer." [12] But without awaiting the Fair Hearing Officer's hearing which he had requested, Clark filed a

[12] This additional procedural protection is provided in the Act dealing with the requirement of CONs, Ala. Code § 22-21-275(14). The implementing regulations provide for appeal from agency decisions denying CONs to a "fair hearing" officer appointed by the Governor, and prescribe the procedure for hearings on such appeals and the standard of review. SHPDA Regs. §§ 410-1-8-.14 to 410-1-8-.26.

petition for judicial review of the Order in the Alabama Circuit Court for Montgomery County on October 26, 1991; and on November 12, 1991, Clark filed a motion in the Federal District Court case,[13] claiming that the administrative action taken by the SHPDA, through the Review Board, was contrary to the terms of that court's injunction issued on April 9, 1991. The motion requested an injunction against further administrative proceedings (including the requested hearing before the Fair Hearing Officer) and against the implementation of the Board's August 26, 1991, order. (Emergency Motion at 22) The Federal District Court denied the motion, finding that "SHPDA has fully and carefully complied with the remedial orders of the court." (App. 16a) In expressing the court's views at the end of the oral hearing on Clark's Emergency Motion, the court said that Clark "got a reasonable decision" and that "I find no failure to comply with the Court's immediate order." (App. 18a)

Administrative and Judicial Review.—On November 15, 1991, a hearing was held before the Fair Hearing Officer, who issued a decision on November 27, 1991, finding that SHPDA did not act in an arbitrary or capricious manner or without reasonable jurisdiction for its decision. (Pet. App. 16a-18a)

After some procedural twists and turns including Clark's filing of two additional actions for judicial review in two different Alabama Circuit Courts, the actions for judicial review were eventually consolidated in Montgomery County Circuit Court. The defendants were Albertville Nursing, Barfield Health, the SHPDA, and Derrell O. Fancher, its Executive Director. A number of the nursing home patients had intervened and participated in the proceedings before the SHPDA, and they also intervened in support of the defendants in the Circuit Court.

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[13] Styled in pertinent part "Emergency Motion for Temporary and Permanent Injunctive Relief To Enforce Prior Orders of this District Court." (Hereafter, "Emergency Motion.")

On June 18, 1993, the Montgomery County Circuit Court entered a judgment affirming the decision of the SHPDA. (Pet. App. 14a-15a) Clark's motion to alter, amend or vacate that judgment was denied on September 1, 1993.

On appeal, the Alabama Court of Civil Appeals unanimously affirmed the Circuit Court's decision and upheld the action of the SHPDA. The court noted that its review of the judgment of the Circuit Court was without any presumption of correctness of the Circuit Court, since the lower court was in no better position to review the Board's order than the appellate court. (Pet. App. 10a) However, the court reiterated the normal standard of judicial review of agency decisions to the effect that the reviewing court may not substitute its judgment as to the weight of the evidence on questions of fact and that the agency's decision is to be upheld unless unreasonable, arbitrary or capricious. (*Id.*) After reviewing the evidence, the court cited with approval the findings of the Board that the correction of the deficient conditions at the two buildings was primarily Clark's responsibility, who was unwilling to make the repairs and improvements necessary to protect the health and safety of the patients. The Board's finding that the grant of the CONs as replacement for the bed capacity in the two Clark-owned buildings was consistent with the legislation, the SHPDA's Rules and Regulations and the Governor's moratorium, and its conclusion that Albertville Nursing and Barfield Health had "grandfathered" interests in the operation of the nursing home beds and services in question before and after July 30, 1979, were also upheld by the court. Thus finding that the Board acted within its authority and that its decision and that of the Fair Hearing Officer were supported by substantial evidence, the Court of Civil Appeals unanimously affirmed the judgment of the Circuit Court. (*Id.*, at 12a-13a)

The Alabama Supreme Court granted Clark's petition for certiorari on November 30, 1994. (Pet. App. 3a)

After briefs on the merits were received, however, that court on May 19, 1995, entered an order quashing the writ of certiorari and denying the petition for certiorari. (Pet. App. 1a)

REASONS FOR DENYING THE WRIT

Clark asks this Court to reassess the evidence which led the ALJ and the Review Board of the SHPDA to conclude that the SHPDA had established no *per se* policy as to when the lessee-operator of a nursing home in Alabama operating on July 30, 1979, and when the landlord of the building in which such a home was situated, had the superior grandfathered right to continue operations, but that the "totality of the circumstances" was to be looked at in each case. Petitioner urges that this Court re-sift the disputed evidence and come to a contrary finding that the landlord *per se* exclusively and always held that status, notwithstanding the concurrent rulings of two courts below that the findings of the SHPDA were supported by substantial evidence. (Pet. 8-15)

In this regard, Clark also asserts that the SHPDA, with the word "health" in its name and charged with administering a "public interest" standard (Ala. Code § 22-21-261), could not as a factor in its decision consider Clark's gross irresponsibility for permitting his buildings to deteriorate, for want of urgently needed major repairs and reconstuctions, into an extremely unsafe, unsanitary and dangerous condition. (Pet. 25) Although not expressly saying so, presumably Clark also would say that the Board could not rely in making its determination, as it did (Pet. App. 37a, 78a), on Clark's withdrawal from the business of operating nursing homes—a withdrawal voluntarily made by Clark albeit under the prospect of losing his license by action of the State Health Department because of improper patient care and unsanitary conditions. (Pet. App. 40a-47a; *see* pages 3-4, above) Clark accuses the administrative agency of changing its policy and "treating like cases differently," but

he points to no case, presenting factors similar to those presented by the unsafe and unsanitary history of the two buildings owned by him and his renunciation of conducting nursing home operations, which was treated in a way differently from the outcome here.

This case presents purely factual issues and issues committed to an administrative agency's sound discretion in terms of the public interest of assuring adequate but not redundant health care facilities for a particularly vulnerable segment of the population. No substantial federal constitutional questions are presented by the Petition and indeed no federal constitutional issue was raised in the State courts, a jurisdictional prerequisite to their consideration in this Court.

1. *No Federal Constitutional Issue was Raised in the State Courts.*—Rule 14.1(g)(i) of this Court admonishes petitioners seeking a review of state court judgments to identify "when the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed on" by the state courts, with "pertinent quotations of specific portions of the record." The Petitioner's response to this (Pet. 19-21) simply demonstrates that he raised a federal constitutional issue in the related proceeding in a federal District Court. *See* Pet. 19; *see* pages 7-9, 12-13, above.

As to raising federal constitutional issues in the state court proceedings, which are the proceedings review of which is now sought, Clark's quotes show only that his contentions below were made in such terms as "violation of constitutional or statutory provisions," "due process of law," "unlawful procedures," "takings" and "substantive due process." (Pet. 20) These phrases do not uniquely refer to federal law; Alabama has statutes and a Constitution; the latter begins with a Declaration of Rights; and the Declaration speaks of "due process" (Ala. Const. of 1901, art. I, § 13), and restricts "takings" (*id.* § 23). Clark never identifies where he raised any specific provi-

sion of the United States Constitution or federal statutes in the state courts whose judgments he now seeks to have reviewed. His quoted references are even more generic th the reference to the "Fourteenth Amendment" said to be insufficient in *Taylor* v. *Illinois*, 484 U.S. 400, 406 n.9 (1988). Of course, Clark admits that none of the state courts that considered his case below discussed any assertion of federal constitutional rights by him. (Pet. 20-21) This presumably was because no such assertion was made.

2. *This is Not a Case of an Administrative Agency Changing Policy or "Treating Like Cases Unlike."*—Clark claims that the agency's action is "procedurally infirm" because it has treated "like cases unlike," claiming that the agency acted in one fashion as to Clark but in a totally different fashion with regard to every other "relocation" application it has ever handled.[14] Pet. 22, 25-26. The subject of when an administrative agency may change its policy and thus treat like cases in an unlike fashion is one which has engendered scholarly discussion. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 541 *et seq.* (1985). When this would rise to a question under the Fourteenth Amendment would be another issue. But no case of it is presented here. This argument is simply another version of Clark's argument, pressed in the federal court case and in the state courts below, that, as a matter of Alabama law and substantive

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[14] The factual basis for this assertion is unidentified. Evidently it is dependent on Clark's attempt, *see* Pet. 8-15, to have this Court re-sift the evidence considered and resolved by the Board) Pet. App. 30a-36a) through Clark's version of the facts. Also unexplained is why Clark's universe is limited to "relocation" cases; this was not a case in which there were simultaneous efforts on the parts both of Clark and of his lessees to move and obtain new CONs for their new premises. Clark rather sought to obtain authority to reopen nursing home facilities in the unsanitary and dilapidated buildings out of which the lessees had moved. *See* page 6, above. The Review Board found that repair or renovation of Clark's buildings was not a viable alternative. (Pet. App. 58a, 77a)

due process [15] the Review Board was required to treat him as having the superior grandfathered right, since landlords, rather than operator-lessees, had that right as a matter of law or under an alleged consistent administrative practice. The findings of the Review Board, however, were that no such *per se* rule could be extracted from the statute or the history of the SHPDA's administration of it, and that, as the District Court had put it, the question involved issues of "policy" committed to agency discretion to further the public interest as prescribed by the CON legislation. (App. 13a) The Review Board held, based on a thorough analysis of the testimony before it, that the established approach of the agency was in fact on a "totality of the circumstances" basis. It is, of course, the settled law in both the federal and state courts that an administrative agency may implement a statutory regulatory regime in a "case-by-case method", on the basis of such a totality of circumstances. *See American Power & Light Co.* v. *SEC*, 329 U.S. 90, 143 (1946); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Village of Herkimer* v. *Axelrod*, 431 N.Y.S.2d 303, 306 (3d Dep't 1982) ("public need" criterion in regulation of hospital).

Here, the totality of the circumstances, as found by the Board and not disturbed on judicial review by three Alabama courts, included the circumstances that Clark ran an unsafe and unsanitary nursing home when he was an owner-operator, one in which there was inadequate patient care, infestation by vermin and other health hazards; that Clark some years before 1979 was on the verge of having his license revoked; that there was an agreement between the State authorities and Clark that he would withdraw from the nursing home business and lease his building to an operator; that he delivered a release of his rights to operate a nursing home to his lessee; that when he built a second structure elsewhere in the County for use as a nursing home, it was always contemplated that he would

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[15] A claim made in federal constitutional terms only in the federal court.

not operate it, but would lease it to an operator on a long-term lease; that this was the state of affairs when the CON legislation became effective; and that Clark thereafter, despite his contractual obligations as landlord, refused to make necessary repairs and reconstruction and permitted the nursing homes to deteriorate so far as to exhibit virtually every form of unsafe and unsanitary condition imaginable. For a case of "unlike treatment" to be presented, Clark would have to bring forward a case where conditions of the sort just described existed and the Alabama public authorities nonetheless treated the landlord, guilty of not making badly-needed repairs and reconstructions, as being the grandfathered party entitiled to operate a "health care service" "in the public interest," rather than the lessees. To the credit of the State of Alabama, no such case exists and none has been brought forward by Clark.[16]

In this regard, however, Clark claims (Pet. 24-25) that it was error, apparently of federal constitutional dimensions, for the SHPDA to have considered the unsafe and unsanitary condition of his buildings, and his responsibility for those conditions, in reaching its decision. Clark says that under state law the only agency charged with any responsibility or having any power to deal with the unsafe and unsanitary conditions was the Department of Public Health. (*Id.* at 25) But the issue whether the SHPDA is required to shut its eyes to unsafe and unsanitary conditions in buildings used as health and nursing facilities and defer entirely on this subject to the

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[16] Factors peculiar to the Guntersville building add to the uniqueness of the present case. Clark is apparently the only person in Alabama who ever built a building for use as a nursing home in the face of the denial of an AON application for it. The beds in the Guntersville building were not approved for inclusion in the State Health Plan when the CON legislation became effective on July 30, 1979. Thus Clark's lessee, Barfield Health's affiliate and predecessor, and Barfield Health, could not obtain reimbursement for their rental expenses as costs until some two years later when Barfield Health, not Clark, made the required showing of public need for the beds.

Department of Public Health and the prosecutorial authorities, or whether it may consider issues of that sort under its "public interest" governing statute, is one which is solely an issue of Alabama law. The Alabama courts unanimously found the SHPDA's decision to be within its statutory authority.

3. *This is Not a Case of a "Taking" of Clark's Property Without Due Process.*—Although the issue appears not to have been raised below, Clark apparently contends that the Due Process Clause of the Fourteenth Amendment was violated by the administrative decision below, granting the CONs to the two lessees at their new locations. Clark claims (Pet. 22-25) that he had a "reasonable investment-backed expectation" (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984)), that his real estate properties could, apparently in perpetuity, be used as nursing homes, and that the grant of CONs to the lessees to operate elsewhere in effect destroyed that expectation. The short answer is that Clark could have had no such expectation. While the Alabama CON legislation was not on the books when his buildings were constructed, a system of licensure of nursing homes based on public health considerations and patient care standards was in effect.[17] A combination of Clark's unsanitary and

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[17] Indeed, one of the two buildings was constructed at a time when an "Assurance of Need" procedure, an immediate ancestor of the "Certificate of Need" procedure, was in effect; and Clark was denied an AON for the building in question. *See* page 4, above. This did not, to be sure, preclude its construction but made its construction costs ineligible for reimbursement under public assistance programs.

Clark asserts that his right to operate a nursing home was grandfathered "by express statutory grant." (Pet. 23) No such statute is cited, and as pointed out (p. 2) above, there is no express statutory grant of any grandfather rights in the CON statute. Moreover, the construction and operation of nursing homes was a field already regulated by the State when Clark constructed each of the two buildings in question. And Clark was not operating a nursing home anywhere in Marshall County when the CON legislation came into effect.

uncaring operation of the Albertville home while he was its operator and the unsafe and unsanitary conditions he permitted to exist and remain uncorrected in both nursing homes when he was simply their landlord was an essential and appropriate basis of the Review Board's decision. Faced with the deteriorated conditions at the two Clark buildings, the regulatory choice was either to permit the patients to be cared for at alternative facilities to be constructed in the county; to require that nursing care in the County be confined to Clark's unsafe and unsanitary facilities; or to shut down the nursing homes in Clark's buildings and force the patients to seek space in other nursing home services outside of the county.

Clark had no legitimate expectation when he built the buildings that he could perpetually operate the buildings as nursing homes or lease them to others for that use notwithstanding noncompliance with standards of sanitation. The maintenance of public health is a core police power of the States, and that, as Clark now claims, his most lucrative use of his buildings would be to rent them out as nursing homes does not mean that he has a federally-protected constitutional right to operate or have them operated as such without regard to standards of public health and patient care. This is not a case where either a physical invasion of property is involved or where all economically viable uses of property are forbidden, at least one of which elements, in the opinion of the majority of the Court in *Lucas* v. *South Carolina Coastal Council,* 112 S. Ct. 2886 (1992), is necessary to constitute a "taking." *See id.,* at 2893-95. Any other lawful uses of Clark's land or buildings, apart from their use as health care facilities, remains open to him. *See Andrus* v. *Allard,* 444 U.S. 51, 65 (1979).[18] Having voluntarily chosen to enter the field of activity of providing public

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[18] In a loan application for a mortgage loan on his buildings, Clark represented to the lender that the Guntersville building "can be used as a nursing home, hospital, motel/lounge and restaurant or rehabilitation center." (B/C Ex. 147; Pet. App. 60a)

health services traditionally regulated by the state under its core police power, or of acting as landlord to those who provide such services, Clark cannot complain about the existence of regulation designed to protect the public interest. *See United States* v. *Locke*, 471 U.S. 84, 104, 107-08 (1985), and cases there cited.

4. *The Unappealed Decision in the Federal District Court Case has Preclusive Effect Against the Contentions which Clark Now Seeks to Present to This Court.*—While Clark never presented his contentions in the Alabama courts as implicating the United States Constitution, he certainly did so present those contentions in his federal court case. As noted above (page 7) Clark there claimed that the initial action of the SHPDA in granting CONs to the two lessees without notice to him violated his procedural due process rights, and that it also violated his substantive due process rights, in each case under the Fourteenth Amendment. The District Court held in its opinion of April 9, 1991 that Clark's contention that as a matter of federal constitutional law the SHPDA was required to treat him, and him exclusively, as the party having "grandfather" rights was not well-taken; and the District Court held, in effect, that as a matter of federal constitutional law, the determination could be made either that Clark had a superior grandfathered right or that the lessees had such a right. (App. 12a-13a; *see* pp. 8-9, above)

A subsequent application, following the proceedings before the ALJ and the Review Board, for injunctive relief by Clark against the enforcement of the Review Board's order, resulted in a denial by the District Court and a finding that the "SHPDA has fully and carefully complied with the remedial orders of the Court." (App. 16a; see also the court's oral ruling, App. 18a) While there was an alternative ground for the court's first order, rendered prior to the administrative hearing and order of the Review Board, that Clark's contentions were premature since no hearing and decision had yet been

reached (App. 13a), the court's substantive ruling was clearly also an alternative ground. Moreover, no issue as to prematurity affected the November 14, 1991, order, rendered as it was after the administrative hearing had been held and the Review Board had entered its order.

Each of the two orders of the District Court was appealable, either as a final judgment or as an order denying an injunction. 28 U.S.C. §§ 1291, 1292(a)(1). The failure of Clark to appeal either of these rulings, disposing of the only expressly-made federal constitutional claim he has made in either court system, makes them *res judicata*. Since the Federal District Court orders recognized that the SHPDA could decide either way, this *res judicata* effect would appear to preclude any of the *per se* assertions which Clark currently makes, such as that the award of the CONs to the lessees amounts to an unconstitutional taking of his property without due process of law or that there was a Constitutionally binding *per se* rule in place at the SHPDA to the effect that the landlord rather than the operating lessee solely and exclusively possessed grandfather rights.

* * * *

Clark was afforded, following the intervention of the Federal District Court, a panoply of procedural protections for his interests. He had a lengthy evidentiary hearing before an Administrative Law Judge appointed by the Governor; a review by a Review Board; a further review by a Fair Hearing Officer; a review on a subsequent examination by the federal district court; a review by a Circuit Court in Alabama; an appeal as of right to the Alabama Court of Civil Appeals; and two examinations of the proceedings below by the Alabama Supreme Court. He presented none of his contentions as federal issues in the Alabama courts. Those contentions, in any event, raise no substantial federal issues for this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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